SUPREME COURT, U.S.
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No. 01-

IN THE

Supreme Court of the United States

CAROL EHLINGER, Individually
and as a Police Officer of the City of Pittsburgh,

Petitioner,

v.

CATHERINE A. GRANGER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Petitioner was a police sergeant responsible for supervising and training respondent, a probationary police officer. A week before Respondent was scheduled to perform her duties alone, petitioner was informed by other officers that respondent had failed to assist in making arrests, had run from incidents and that some officers were concerned respondent was endangering others. While both were on duty, petitioner confronted respondent about her conduct and then grabbed her about the throat, causing some injury, to determine whether she could defend herself from an unexpected attack while working alone. A jury found that petitioner had violated respondent's Fourteenth Amendment substantive due process entitlement to the integrity or security of one's own body. The questions presented are:

a. Whether in a suit filed under 42 U.S.C. § 1983 by respondent alleging petitioner violated the Fourteenth Amendment's guarantee of substantive due process, the "under color of state law" requirement is fulfilled based solely upon the supervisor-subordinate employment relationship.

b. If so, whether in a suit filed under 42 U.S.C. § 1983 alleging petitioner assaulted respondent in retaliation for her failure to participate in or condone the abuse and mistreatment of citizens arrested by other police officers, petitioner's actions violated the Fourteenth Amendment's guarantee of substantive due process absent proof of the alleged retaliation.

2. The District Court instructed the jury that it could find petitioner's actions constituted "conscious shocking behavior" if those actions were a "substantial departure from professional judgment." The question presented is:

a. Whether the "substantial departure from professional judgment" standard of culpability is applicable in a Fourteenth Amendment substantive due process claim alleging physically abusive government conduct.

LIST OF PARTIES

The petitioner is Carol Ehlinger, a defendant in the District Court and appellant in the Court of Appeals.

Respondent is Catherine A. Granger, plaintiff in the District Court and appellee in the Court of Appeals.

The City of Pittsburgh was a defendant in the District Court where the jury found in its favor and against the respondent, Catherine A. Granger.

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OPINION BELOW

The Memorandum Opinion of a Panel of the Court of Appeals (App. A, *infra*, at 1a) is unreported.

STATEMENT OF JURISDICTION

The Court of Appeals entered an order on November 7, 2001 (App. D, *infra*, at 25a) denying Carol Ehlinger's Petition for Rehearing by the panel and the Court en banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Amendment XIV of the United States Constitution

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 42 U.S.C. § 1983

Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any

> State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub. L. 96-170, § 1, Dec., 29, 1979, 93 Stat. 1284.)

STATEMENT OF THE CASE

A. Facts Material to the Questions Presented

In May, 1995 Catherine M. Granger, respondent, graduated from the City of Pittsburgh Police Academy and was assigned to a COP (Community Oriented Police) unit in the Zone 3 police district.

Sergeant Carol Ehlinger, petitioner, was Granger's immediate supervisor responsible for ensuring that she received "on the job training" before performing duties alone. Between May, 1995 and August 30, 1995 two officers trained Granger. The first, training officer James Stuhr was replaced in mid-August when Ehlinger concluded he was not effectively training Granger. Officer Robyn Boettsch replaced Stuhr.

On August 30, 1995 Boettsch and another officer, Eugene Hlavac met with Ehlinger to express concerns about Granger's performance. Both officers told Ehlinger that on August 30, 1995 Granger had failed to assist them and another officer in restraining an individual at a drug rehabilitation facility who was out of control. Boettsch stated Granger ran from the confrontation. Hlavac told Ehlinger Granger had also failed to assist him and Stuhr in making an arrest on July 24, 1995. Further investigation by Ehlinger revealed Granger had run from other incidents and some officers were concerned that Granger was endangering others. Granger was scheduled to work alone the following week. Based on this information, Ehlinger confronted Granger when she returned to the Zone 3 station that day.

Ehlinger asked Granger what police work was all about. Granger replied there are many aspects to police work at which point Ehlinger grabbed Granger about the throat. Granger claimed Ehlinger also banged her head against a brick wall, struck and pulled at her face and protective vest. Ehlinger denied this additional physical contact. The incident lasted about thirty seconds.

Granger said that when Ehlinger grabbed her she feared for her life and believed Ehlinger intended to hurt her. Immediately after this confrontation, Granger sat with Ehlinger in her office for forty-five minutes to an hour. They discussed a number of subjects including Hlavac's conduct during the incidents of July 24, 1995 and August 30, 1995; Ehlinger's position that once an arrest is initiated there is a need to follow through on it by assisting other officers; and, incidents of alleged police brutality that Granger claimed she had witnessed, in particular by Hlavac during the July 24, 1995 incident. Granger acknowledged that prior to this

discussion she had not complained to Ehlinger about incidents of police brutality, had not told her how she felt about them or why she had failed to participate in arrests.

Medical records document Granger had abrasions and bruises consistent with the physical contact described by Granger. Several weeks later, Granger reported what she claimed was an assault by Ehlinger to Sergeant Dennis Washington. In his report of Granger's complaint he wrote, "[O]fficer Granger stated that Sergeant Ehlinger told her that she was just testing her to see how she would handle herself in a sudden attack by an actor." In a report of the alleged assault prepared by Granger she wrote, "[S]ergeant Ehlinger then said that this is what it is like when someone is trying to kill you. I told her that to me she obviously doubted my ability to defend myself."

At trial, Ehlinger offered the following explanations for her confrontation of Granger during examination by Granger's counsel:

> Q. And Granger was certainly not expecting that she would be grabbed by you in your office on August 30th, 1995?
>
> A. No, sir, but she wouldn't have been expecting it if someone grabbed her out on the street, and that was my whole purpose in doing it. Why, I don't know why I chose that, as I said, exact thing or what, but I was afraid that she wouldn't be able to act if she was out there by herself and someone did that to her. I already know she couldn't talk on the radio. I had people telling me she's running from scenes, running from calls.

> Q. Now, you agree with me, won't you, Sergeant Ehlinger, that none of the complaints that you heard had to do with Catherine Granger being unable to defend herself?
>
> A. Sir, they all had to do with Catherine Granger not assisting anybody when there were other officers there. I was concerned that she was going to be alone the following week, and if she couldn't do anything when there were other people there, what was she going to do when she was alone.

Ehlinger's actions in confronting Granger were not sanctioned by the Bureau of Police and she was given a reprimand.

On February 16, 1996 Granger filed suit under 42 U.S.C. § 1983 against Ehlinger and the City of Pittsburgh (City) claiming violations of rights guaranteed by the First, Fourth, Fifth and Fourteenth Amendments. The District Court had original jurisdiction pursuant to 28 U.S.C. § 1331, Federal Question. Granger claimed that Ehlinger had retaliated against her because she failed to participate in or condone the abuse of persons arrested by other officers. The alleged retaliatory acts included an assault by Ehlinger on Granger on August 30, 1995 resulting in physical injuries and other actions by Ehlinger alleged to have diminished or jeopardized her position as a police officer.

A single claim under the Fourteenth Amendment was submitted to the jury as to Ehlinger. The relevant portion of the District Court's jury instruction on this claim, which made

no reference to the retaliatory motive plead by Granger, read as follows:

> Plaintiff's first claim is that on August 30th, 1995, Carol Ehlinger assaulted her in a Zone 3 police station, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution. The due process clause provides, in part, that no state shall deprive any person of his liberty without due process of law. The term "state" includes any government body such as the City of Pittsburgh. The term "liberty" is broad and includes the right to the integrity or security of one's own body. . . .
>
> The part of the due process clause we are concerned with in this case protects rights that are so fundamental that a state may not take them away. The standard for what constitutes a violation is somewhat imprecise; however, governmental actions violate due process when they are so arbitrary, irrational and unreasonable, or such a *substantial departure from accepted professional judgment* so as to shock the conscience or offend a sense of justice. (emphasis supplied)
>
> Plaintiff claims that Miss Ehlinger violated her rights on August 30th, 1995, by intentionally, and without provocation, physically assaulting her. You must decide whether Carol Ehlinger's actions on August 30th were so arbitrary, irrational and unreasonable, or such a *substantial departure from accepted professional judgment* as to shock the conscience or offend the sense of justice. (emphasis supplied)

PROCEEDINGS BELOW

At the close of Granger's case, Ehlinger moved for Judgment as a Matter of Law Pursuant to Rule 50, contending that she was not acting "under color of state law" on August 30, 1995 when Granger alleged she was assaulted and that her actions did not state a claim for a violation of substantive due process. The District Court denied the motion as well as a Renewed Motion for Judgment as a Matter of Law filed after entry of judgment. The jury was instructed that Ehlinger acted under color of law on August 30, 1995.

The jury found in favor of Granger and against Ehlinger on the claim that Ehlinger had violated rights guaranteed by the Fourteenth Amendment and awarded $40,000 in compensatory damages and $75,000 in punitive damages. A timely Notice of Appeal was filed invoking the appellate jurisdiction of the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1291.

In a Memorandum Opinion of the Court filed January 24, 2001 the judgement of the District Court was affirmed. Ehlinger's argument that she was not acting "under color of state law" when she confronted Granger was rejected based on her authority over Granger as a supervisor and a finding that her actions were made possible only because she was "clothed with the authority of state law." The Court found no merit to the argument that Ehlinger's actions toward Granger amounted to only a traditional tort and did not rise to the level of a substantive due process violation. The Court reasoned that the right to bodily integrity was a fundamental liberty interest protected by the Fourteenth Amendment and that Ehlinger's conduct was conscious shocking. The Court of Appeals did not address Ehlinger's arguments that her

conduct did not implicate the large concerns of the governors and governed nor that Granger failed to state a claim for a violation of substantive due process without establishing the retaliatory motive she had initially plead. The Court of Appeals found no merit to Ehlinger's argument that the District Court's use of the phrase "substantial departure from professional judgment" established a lesser and inappropriate standard of culpability than was required to define conscious shocking behavior in the case. The Court simply noted, without analysis that the phrase was used only twice and it did not relax the legal standard because ultimately the test is whether the conduct "shocks the conscience."

Ehlinger filed a Petition for Rehearing and Suggestion for Rehearing In Banc on February 7, 2001. The Court of Appeals denied the Petition by Order of November 7, 2001.

REASONS FOR GRANTING THE WRIT

I. The Questions Presented Are Important

In *West v. Atkins*, 487 U.S. 42, 50 (1987) this Court noted that in only one case, *Polk County v. Dodson*, 454 U.S. 312 (1981) had it determined that a state employee who was sued "[u]nder § 1983 for abusing his position in the performance of his assigned tasks was not acting under color of state law." The instant case, though factually distinct from *Polk County*, is nevertheless one in which this Court should determine that petitioner did not act under color of state law because her conduct does not satisfy the state-action requirement of the Fourteenth Amendment. The core concept of due process and the limits of its application, as well as prior decisions of this Court, require a finding that not every public employee is a state actor, per se, one whose every action is attributable to

the state. And, this is particularly so in this case since the Court of Appeals decision was based solely upon the supervisor-subordinate relationship. These same considerations should also be applied to find that in this case, absent proof that petitioner's conduct was a form of retaliation, the substantive component of the Due Process Clause does not afford respondent protection as a state employee. Lastly, the instruction given the jury setting forth a standard of culpability sufficient to define conscious shocking behavior allowed the jury to make a finding of liability using a standard this Court has sanctioned only in substantive due process claims arising from an alleged failure to properly exercise professional judgment to protect the rights of the involuntarily committed mentally retarded. The "substantial departure from professional judgment" standard of culpability has no relevance to a claim of physically abusive government conduct and should be preserved for use in its proper context. Because the decision of the Court of Appeals on these matters fails to preserve the constitutional proportion of constitutional claims and is inconsistent with prior decisions of this Court, Certiorari should be granted.

A. Petitioner Did Not Act Under Color Of Law

Whether deciding the standard of culpability necessary to reach the level of conscience shocking behavior or whether deciding the guarantees of the substantive component of the Fourteenth Amendment's Due Process Clause afford protection to an aggrieved party, this Court has consistently addressed these issues only after a careful review and consideration of the core principles defining the intent and limits of due process. *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (due process is the protection against

arbitrary action; protection of the individual against arbitrary action of government is the "touchstone" of due process); *Daniels v. Williams*, 474 U.S. 327 (1985) (Constitution deals with large concerns of the governors and governed and does not supplant traditional tort law); *Paul v. Davis*, 424 U.S. 693 (1976) (Fourteenth Amendment not a font of tort law); *Collins v. Harker Heights*, 503 U.S. 115 (1992) (intent of Due Process is to prevent government officials from abusing their power or employing it as an instrument of oppression; due process is not a guarantee against incorrect or ill-advised personnel decisions). The importance of these principles in determining whether a due process violation has occurred is evident by this Court's "[r]eluctance to expand the concept of substantive due process because the guideposts for responsible decision making in this uncharted area are scarce and open-ended." *Collins v. Harker Heights*, *supra*, at 125.

The application of these principles is perhaps best illustrated in *Daniels v. Williams*, *supra*, at 332 where the Court held that the actions of prison custodians were "quite remote from the concerns" of due process and to hold otherwise "would trivialize the centuries-old principle of due process of law." These same considerations, as well as the due process concepts referred to, should also be used to test whether on the facts of this case petitioner's actions were taken under color of state law.

Petitioner reasons that her actions directed against a subordinate in a training context, but not taken for a retaliatory purpose, simply do not implicate the historic concerns of due process and thus do not fall within the Fourteenth Amendment's state action requirement nor the color of law requirement of § 1983. This position is not inconsistent with *West v. Atkins*, 487 U.S. 42 (1987) nor the

fact of petitioner's state employment, *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 936 (1982), because petitioner was not exercising her powers as a police officer against a citizen, she did not use her power as a supervisor to harm respondent and her position as a police sergeant does not render her a state actor. (In a § 1983 claim state action and action under color of law are identical requirements. *Lugar v. Edmondson Oil Co.*, *supra*, at 920.)

The facts surrounding petitioner's confrontation of respondent do not fit neatly, nor perhaps at all, within any category of what has traditionally been accepted as state action. *United States v. Lanier*, 520 U.S. 259 (1997) presents an analogous, yet very distinct parallel supporting petitioner's argument. Lanier, a state trial judge, used his official power to extort sexual favors from a potential litigant and in other ways with respect to employees and court personnel he abused. *Cf. Wilson v. Layne*, 526 U.S. 603, 621 (1999). Prior to the decision in Lanier, no judicial opinion had held "it was unconstitutional for a state judge to use his official power" in such a manner. *Id.* He was found guilty under 18 U.S.C. § 242 of criminally violating the victim's constitutional rights to bodily integrity. The Court noted that on remand the Court of Appeals should not consider Lanier's argument "[t]hat there is no constitutional right to be free from assault committed by *state officials* themselves outside of a custodial setting." *United states v. Lanier*, *supra*, at 272, n.7 (emphasis added). The fact that an assault can be committed by a state official outside of a custodial setting parallels the instant case. *Lanier* is distinct from the instant case though because of the defendant's high state position.

The panel of the Court of Appeals that addressed Lanier's defense that he was not acting under the color of state law

recognized this when it noted, "[F]urthermore, we wish to emphasize that his case involves much more than a defendant who is a *mere public official*" (emphasis added). *United States v. Lanier*, 33 F.3d 639, 653 (6th Cir. 1994). The Court has previously looked to the state actors position and duties in determining whether the color of state law requirement of § 1983 has been fulfilled.

In *Parratt v. Taylor*, 451 U.S. 527, 535-536 (1980) the Court found that the petitioner's conduct satisfied the "under color of state law" element of § 1983: "[P]etitioners were, after all, state employees in *positions of considerable authority*." (emphasis added) The Court in *Polk County v. Dodson, supra*, at 319-320 rejected respondent's argument that because institutional physicians were state employees and dealt with patients much like a public defender, in that defendants and patients are unable to choose a private professional, a public defender acts under color of law. The Court reasoned that a public defender is adverse to what the state seeks in a criminal proceeding whereas, "[I]nstitutional physicians assume an obligation to the *mission that the State*, through the institution, attempts to achieve" (emphasis added). In this case, petitioner contends that her position is not comparable to that of institutional physicians. First, her conduct was not in fulfillment of the mission of her state employer, the Bureau of Police, in that there was no law enforcement aspect. Second, her mission is law enforcement. Collateral to the traditional state mission of the executive, law enforcement, are the many duties that are attendant to any organization, public or private, including training of personnel. Petitioner asserts that training is not a mission of the state, nor is the fact of state employment while conducting training a sufficient basis for finding that she acted under color of state law when viewed against the historic

intent and proportions of the Due Process Clause. Stated otherwise, recognizing training as state action arguably trivializes due process. This position is not inconsistent with the holding of this Court in *West v. Atkins*, *supra*, at 56 n.15 that "[t]he fact that a state employee's role parallels one in the private sector is not, by itself, reason to conclude that the former is not acting under color of state law in performing his duties." There is no inconsistency in the instant case because petitioner's conduct was not directed toward an individual in fulfillment of the law enforcement mission of the state, but rather another employee. *Cf. Griffin v. Maryland*, 378 U.S. 130, 135 (1964).

The absence of some indicia that petitioner in this case was fulfilling a mission of the state should be contrasted with respondent's claim that petitioner retaliated against her because she failed to participate in or condone the abuse of arrestees.

Had respondent established the retaliatory motive she plead, then arguably petitioner's conduct could be characterized as state action because she would have been using her position as a law enforcement officer to subvert proper law enforcement. Such action would be analogous to the claims this Court noted would be meritorious if taken by an employer against an employee even if no governmental power was employed, i.e. giving an employee a particularly dangerous assignment in retaliation for a political speech or based on gender. *Collins v. Harker Heights*, *supra*, at 119. Noteworthy is the fact that the failure to establish a retaliatory motive tends to establish that petitioner, unlike Lanier, did not use her official power against respondent. To be sure, the absence of a retaliatory motive as plead is precisely why respondent's claim does not rise to the level of a substantive due process violation.

If the constitutional proportions of constitutional claims are to be preserved, it is reasonable that the actions of a state employee be measured against the principles of due process, and not just the fact of state employment or the relationship of one state employee to another, in determining whether state action or action under color of law are present.

The Court of Appeals rejected this argument, relying on its decision in *Bonenberger v. Plymouth TP.*, 132 F.3d 20, 24-25 (3d Cir. 1997) which held that in a § 1983 Equal Protection sexual harassment claim, "[I]f a state entity places an official in the position of supervising a lesser-ranking employee and empowers him or her to give orders which the subordinate may not disobey without fear of formal reprisal, that official wields sufficient authority to satisfy the color of law requirement of 42 U.S.C. § 1983." In crafting this construction of the under color of state law requirement, the Court of Appeals did not support it with precedent in the Circuits or of this Court. The concern that Bonenberger raises should be that it forecloses any meaningful inquiry into whether the complained of conduct was taken under color of state law, including a defendant's claim that his or her actions were taken for purely private motives and therefore were not under color of law. *Cf. Screws v. United States*, 325 U.S. 91, 111 (1945) (personal pursuits of officers plainly excluded from actions under color or pretense of Law). The Court of Appeals suggests the personal pursuits defense remains available but petitioner questions whether any defendant could wiggle out of this per se rule. *Bonenberger* is also inconsistent with this Court's holdings in *Polk County v. Dodson*, *supra*, at 321 and *Collins v. Harker Heights*, *supra*, at 119, which held respectively, that the employment relationship though a relevant factor is not sufficient to establish action under color of state law or controlling in determining whether a constitutional violation has occurred.

Petitioner contends that the Court of Appeals decision in *Bonenberger* should not be the sole test for whether petitioner acted under color of state and that the principles defining due process previously discussed are more appropriate to such an analysis on the facts of this case.

B. Respondent Should Not Have Been Afforded Substantive Due Process Protections

This Court has recognized a substantive due process entitlement to personal integrity. *Youngberg v. Romeo*, 457 U.S. 307 (1982). In this case, the issue is therefore not whether this right exists, but whether it afforded protection to respondent when petitioner confronted her. Petitioner has noted in the preceding argument that respondent's claim is characteristic of a state-court tort claim in that petitioner physically grabbed her but had no right to do so under police regulations. What would raise this claim to a constitutional tort is just what respondent plead, but never proved, which is that she was assaulted in retaliation for having failed to participate in or condone the abuse of arrestees. Had petitioner acted with this motive, she would have subverted her position, clearly abused it, to in effect persuade respondent to violate the Fourth Amendment rights of citizens subject to arrest. In such actions, there clearly would be no legitimate government purpose and petitioner would have abused her position. *Cf. Collins v. Harker Heights*, *supra*, at 119 (potentially meritorious claim by employee if city retaliates for a political speech by giving employee a particularly dangerous assignment). The fact remains though, petitioner did not retaliate against respondent and while her actions were contrary to regulations, the appropriate remedy should have been pursued through a state-court tort claim. *Collins v. Harker Heights, supra*, supports such a remedy in

this case. After reviewing those cases which hold the Due Process Clause does not impose federal duties, the Court wrote, "[t]he reasoning in those cases applies with special force to claims asserted against public employers because state law, rather than the Federal Constitution, generally governs the substance of the employment relationship." *Id.* at 128. Other considerations also compel a finding that substantive due process protections were not implicated.

Absent a retaliatory motive, it is difficult to view petitioners conduct as a matter that can be said to deal "[w]ith the large concerns of the governors and the governed . . .", *Daniels v. Williams*, *supra*, at 332. Further, petitioner's position as a police sergeant is far different from that of a state judge, as in *Lanier*, who used his official power as a judicial officer to extort sexual favors. This difference in status is striking and thus the level of authority held by petitioner, as well as the absence of a retaliatory motive and the lack of a law enforcement aspect to training support a finding that due process guarantees should not be afforded respondent. To find otherwise would trivialize the concept of due process and extend it well beyond the limits this Court has recognized. *Collins v. Harker Heights*, *supra*, at 125.

On a more practical level, the consequence of affirming the Court of Appeals decision would make any physical contact by a supervisor against a subordinate which is not specifically allowed by the state actionable under § 1983. If the Due Process Clause is not to become a font of tort law, then surely the petitioner's actions in this case should be found to not have deprived respondent of a constitutional right. *Lanier*, *supra*, is again relevant to this argument. There can be no doubt that case epitomizes the egregious and arbitrary abuse of state power the Due Process Clause

was intended to prevent and which § 1983 serves to remedy. The Court's holding that a constitutional deprivation could occur without a custodial setting is of course a correct decision. However, the decision in *Lanier* should be recognized not so much as an extension of due process guarantees, but as a limitation on them based on the state actors' position. To view the case otherwise would make every state supervisor, no matter how low his or her position in the municipal structure, a target. At some point the Court must find that not every municipal supervisor is "a party whose official character is such as to lend the weight of the State to his decisions." *Lugar v. Edmundson Oil Co., supra*, at 937, and that conduct which is harmful to a subordinate is not actionable through a substantive due process claim. In short, the power and status of the actor should determine whether due process guarantees are available, not the fact of state employment or that a person is a supervisor, absent a retaliatory or discriminatory motive.

The potential for an improper extension of the due process guarantees based only on the state created supervisor-subordinate relationship is illustrated by the District Court's instruction to the jury defining the standard of culpability necessary to find conscience shocking behavior.

II. The Decision Of The Court Of Appeals Is Erroneous

The District Court instructed the jury that government actions violate rights protected by the Due Process Clause when they are "such a substantial departure from accepted professional judgment so as to shock the conscience or offend a sense of justice." (Petition, *supra*, at 6). This standard of culpability was established by the Court in *Youngberg v. Romeo*, 457 U.S. 307, 323 as a guide to determining whether

a "State has protected the rights of the involuntarily committed mentally retarded." *Id.* at 321. The standard comprehends only professionals in an institutional setting and is premised on policy concerns that do not exist in the instant case involving a claim of physically abusive executive conduct. For these reasons, the Court of Appeals erred in rejecting petitioner's argument that this standard was improperly applied to determine conscience shocking behavior.

The standard was created to deliberately limit interference by the federal judiciary with challenges to conditions in State institutions because as the Court noted, "[t]here certainly is no reason to think judges or juries are better qualified them appropriate professional in making such decisions." *Ibid.* at 322-323. Petitioner does not view this standard as having any factual or policy based parallel to the circumstances of her confrontation with respondent. They are vastly different. Moreover, the standard as applied in this case can only be viewed as lessening the degree of wrongfulness necessary to find conscience shocking behavior.

In *County of Sacramento v. Lewis*, *supra*, at 847-848 n.7 the Court emphasized the need to preserve the constitutional proportions of constitutional claims involving executive action by asking whether the government behavior is egregious and outrageous. Petitioner contends that in the context of this case, as compared to an institutional setting, the institutional standard cannot adequately or fairly guide a jury in determining whether petitioner's behavior was conscience shocking. Police work is dangerous and each officer must for his own protection as well as that of the public be able at least to defend himself or herself. While petitioner's actions were not approved or condoned by her

supervisors, that is not to say that they were improperly motivated. Indeed the record only supports a finding that she sought to determine whether respondent could defend herself when working alone. Against this background, the substantial departure from professional judgment standard fails to acknowledge the realities of police training, or the work itself, and permitted the jury to make its finding of liability without consideration of these factors.

The Court of Appeals rejected this argument by simply noting that the standard was only used twice and the legal standard was not relaxed because the ultimate test was whether petitioner's conduct shocked the conscience. (Appendix A, *infra*, at 11a). This analysis begs the question. In *County of Sacramento v. Lewis*, *supra*, at 850, this Court made clear that, "[o]ur concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." The Court of Appeals in *Miller v. City of Philadelphia*, 174 F.3d 368, 375 (3d Cir. 1999) recognized this concern when it noted, "the 'shocks the conscience' standard is problematic standing alone . . ." and "[T]he exact degree of wrongfulness necessary to reach the 'conscience shocking' level depends upon the circumstances of a particular case." Nevertheless, the Court of Appeals failed to give any consideration to the circumstances of the case let alone an "exact analysis" of them in deciding whether the substantial departure from professional judgment standard properly described the degree of wrongfulness necessary to reach the conscience shocking level. In disposing of the claim of error the Court of Appeals simply held:

> The District Court used the phrase at issue only twice. East time, the Court clearly stated that a substantive due process violation could be found

> only where a substantial departure from professional judgement actually shocks the conscience. The phrase did not relax the legal steward since the ultimate test was whether the conduct "shocks the conscience." Moreover, the reference to professional judgement was not inappropriate since the injury into substantive due process sometimes involves contemporary professional norms.

Appendix A at 11a.

This holding ignores the need to define an appropriate standard of culpability or degree of wrongfulness required to find "conscience shocking" behavior. By noting the ultimate test was whether the conduct was "conscience shocking", the Court of Appeals did nothing to address its acknowledged point that this critical standard is problematic standing alone and did not develop a justification in the context of "contemporary professional norms" for applying the "substantial departure from professional judgement" standard.

By failing to address the vast difference in circumstances between this case and those of an institutionalized citizen, the Court of Appeals erred in its decision and failed to preserve the constitutional proportions of the substantive due process claim.

CONCLUSION

The Court of Appeals failed to apply the core principles of due process in its decision regarding questions of color of state law and the availability of due process protections. It erred in deciding whether an inappropriate standard of culpability had been applied in determining a substantive due process claim. As a result, the constitutional proportions of substantive due process have not been preserved and the petitioner has been unfairly subjected to liability.

Respectfully submitted,

STEVE H. BOWYTZ
Attorney for Petitioner
220 Grant Street
Third Floor
Pittsburgh, PA 15219
(412) 281-6896

APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT SUBMITTED DECEMBER 18, 2000 AND FILED JANUARY 24, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-3169

CATHERINE A. GRANGER

v.

CITY OF PITTSBURGH; CAROL EHLINGER,
individually and as a Police Officer for
the City of Pittsburgh

Carol Ehlinger, individually and as a Police
Officer for the City of Pittsburgh,

-

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

(D.C. Civ. No: 96-cv-00240)

District Court Judge: The Honorable Gary L. Lancaster

Submitted Under Third Circuit LAR 34.1(a)
December 18, 2000

Appendix A

Before: BECKER, *Chief Judge*, NYGAARD, and FUENTES, *Circuit Judges*

(Opinion Filed: January 24, 2001)

MEMORANDUM OPINION OF THE COURT

FUENTES, *Circuit Judge*:

While on duty at a police station, the appellant, police sergeant Carol Ehlinger, grabbed her subordinate, Catherine A. Granger, by the throat, allegedly as a training exercise. Granger brought suit against Ehlinger and the City of Pittsburgh alleging, among other things, violations of substantive due process. A jury returned a verdict for Granger and against Ehlinger on the due process claim and awarded $40,000 in compensatory and $75,000 in punitive damages. Ehlinger appeals. Because we find no merit in Ehlinger's numerous claims of error, we will affirm.

I.

In January 1995, the City of Pittsburgh hired Granger as a police officer. In June 1995, she began a probationary period in the Zone 3 police district, under the supervision of training officer James Stuhr.

On July 24, 1995, officers Granger, Stuhr, and Eugene Hlavac responded to a domestic call involving the "theft" of a baby on East Warrington Avenue, where they confronted two black men, one of whom, Steven Gordon, held a baby. Granger testified that Hlavac struck Gordon without

provocation, and uttered numerous racial epithets, including calling the baby "just another nigger on welfare." She testified that Hlavac brought Gordon to the Zone 3 station, handcuffed him by one hand to a bench, beat him, and called him a "nigger." According to Granger, other officers also punched Gordon while her supervisor, sergeant Ehlinger, looked on.

In his testimony, Hlavac disagreed with Granger's version of events. Hlavac testified that he and Stuhr attempted to calm Gordon down and retrieve the baby, but that a physical struggle ensued. Hlavac denied hitting Gordon. Stuhr was more equivocal. While he did not recall any racial epithets and did not see Hlavac strike Gordon at the station, he testified that Hlavac and Gordon were in each others faces, screaming and flailing their arms. Stuhr also witnessed another officer scream and push Gordon.

In mid-August 1995, Ehlinger removed Stuhr as Granger's training officer, believing that Stuhr was failing to train Granger to be assertive and was allowing Granger to avoid potentially unpleasant or dangerous calls. Ehlinger replaced Stuhr with officer Robyn Bottesch.

On August 30, 1995, Granger and Bottesch responded to a "drug rehab" call at Birmingham Towers, where a man had responded angrily when told he would not get any medication. Granger testified that when Hlavac arrived, he inflamed the situation by exchanging insults with the man. Subsequently, Hlavac and Bottesch handcuffed the man and took him to the hospital. Hlavac did not hit the man, but stated that if the man had got any closer to him, "he was going to have to shoot him." Hlavac and Bottesch testified

that Granger was frightened and failed to assist them in the arrest. Hlavac, who was particularly incensed, told others that Granger was a coward.

Later that day, Bottesch and Hlavac spoke to Ehlinger, relating their concerns about Granger's failure to assist them. On further investigation, Ehlinger learned that Granger had run from incidents and that some officers were concerned that Granger was endangering others. Later, when Granger returned to the Zone 3 station, she went to Ehlinger's office. Ehlinger was on the phone. Granger testified as to what followed:

> After [Ehlinger] finished her call, she slammed the phone down, and she turned around and she said, Granger what's police work all about? And I said, ma'am, I said . . . there's a lot of different aspects of police work.
>
> At that point, she grabbed me by my throat, took the back of her hand, smacked my head up against the brick wall, took my . . . wind pipe, and was pulling on my wind pipe here, and was like pulling back and forth. At that point I took my elbows smacked them up against the brick wall and broke her . . . choke hold on my neck.
>
> And she continued to pull it back and forth, and there was scratches and stuff, and she was like pulling, either my face, my vest. . . .

> Um, my chair fell. She pushed me to another chair. When I fell into the other chair, I fell sideways. The chairs are metal here, or hard wood, or whatever. . . .
>
> She said, how does it feel to have somebody try to kill you?
>
> . . . She, she told me that this was a, a choke-men's hold that she learned from an old police officer to – like a killer hold.

Granger claims that, during the attack, she feared for her life and believed that Ehlinger intended to hurt her. The attack lasted about 30 seconds. Afterwards, Ehlinger lectured Granger that, whether or not she agreed with an arrest, once another officer starts an arrest, all other officers must follow through and participate. In response, Granger pointed out the incidents of police brutality. After some further words, Ehlinger told Granger to leave and clean up the blood on her throat.

Medical records document the attack. Several doctors examined Granger, and found abrasions and bruises consistent with the physical assault described by Granger. After speaking with Granger and viewing hospital photographs of her neck, another police officer, Dennis Washington, wrote a report documenting the attack. Washington related that "[o]fficer Granger stated that Sergeant Ehlinger told her that she was just testing her to see how she would handle herself in a sudden attack by an actor." Granger also prepared reports describing the confrontation.

Ehlinger acknowledged grabbing Granger by the throat for 10-15 seconds, but denied that it was a "choke hold" and denied that it constituted deadly force. She also denied banging Granger's head against the wall; squeezing or pulling Granger's neck, and striking or pushing Granger's face, chest or ribs. She testified that she was not trying to silence Granger about police brutality, but only wanted to see if Granger could defend herself from an unexpected attack.

On February 9, 1996, Granger filed suit in federal district court under 42 U.S.C. § 1983 claiming violations of rights guaranteed by the First, Fourth, Fifth, and Fourteenth Amendments. Granger alleged that Ehlinger, her supervising police officer, had retaliated against her because she refused to participate in or condone the abuse and mistreatment of persons arrested by other police officers. Granger also alleged that Ehlinger had violated her substantive due process rights. In addition, Granger alleged that the City of Pittsburgh, through its actions, inaction and certain practices and policies, condoned or caused Ehlinger to act as she did towards Granger.

Trial ended on December 23, 1999. The jury found in favor of the City of Pittsburgh, and against Granger on a single claim submitted to the jury that the City had retaliated against her in violation of rights guaranteed by the First Amendment. However, the jury found in favor of Granger and against Ehlinger on a single claim submitted to the jury that Ehlinger had violated rights guaranteed by the substantive due process component of the Fourteenth Amendment, the right to integrity or security of one's body. It awarded $40,000 in compensatory and $75,000 in punitive damages.

Appendix A

Ehlinger appeals, raising numerous claims of error.

II.

At the close of Granger's case, Ehlinger orally moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50. The motion was denied. Ehlinger begins by arguing that, because Ehlinger could not have been found to be acting under the color of state law, the District Court erred in denying the Rule 50 motion. We have plenary review of a district court's denial of a Rule 50 motion. *Paolella v. Browning-Ferris, Inc.*, 158 F.3d 183, 189 (3d Cir. 1998). Such a motion should be granted only if, viewing the evidence in the light most favorable to the party opposing the motion, no jury could have decided in that party's favor. *Id.* (citation omitted).

Ehlinger argues that, although her actions occurred on duty and related to training, her actions could have been taken by a supervisor towards a subordinate in any context, public or private, and did not relate to any state granted power or duty. Thus, Ehlinger argues, she did not act under the color of state law, as required for a claim under 42 U.S.C. § 1983. *See West v. Atkins*, 487 U.S. 42, 48 (1988). We reject this argument.

In *Bonenberger v. Plymouth*, we held that, for purposes of Section 1983, a police sergeant, who supervised police dispatchers, acts under color of state law when he sexually harasses one of the dispatchers. 132 F.3d 20, 23-25 (3d Cir. 1997). We stated that "[i]f a state entity places an official in the position of supervising a lesser-ranking employee and

empowers him or her to give orders which the subordinate may not disobey without fear of formal reprisal, that official wields sufficient authority to satisfy the color of law requirement of 42 U.S.C. § 1983." *Id.* at 24-25.

In the present case, Ehlinger was Granger's supervisor. Ehlinger physically assaulted Granger while they were both on duty, in uniform, and within Ehlinger's office. In her original answer, Ehlinger has explained that the attack was committed pursuant to "training incidental to [Granger's] status as a probationary police officer." A reasonable jury could have found that Ehlinger acted under color of state law since she "exercised power possessed by virtue of state law and made possible only because [she was] clothed with the authority of state law." *Bonenberger*, 132 F.3d at 23 (internal quotations and citations omitted).[1]

Next, Ehlinger argues that the District Court erred in denying her Rule 50 motion because the attack she perpetrated was a traditional tort, and did not rise to the level of a substantive due process violation.[2] This argument has no merit.

---

1. Ehlinger cites several cases where conduct of state employees was held to be not under the color of state law due to the personal motivations of the offending employee. These cases are distinguishable on their facts since they involved purely private acts not furthered by state authority. *See, e.g., Barna v. City of Perth Amboy*, 42 F.3d 809, 816-17 (3d Cir. 1994) (off-duty police officers involved in a personal dispute were not acting under color of state law).

2. While Ehlinger did not express this argument in the clearest terms in her Rule 50 motion, we do not think Ehlinger waived the

(Cont'd)

Appendix A

The establishment of a substantive due process violation requires the demonstration of a fundamental liberty interest protected by the Fourteenth Amendment. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The right to bodily integrity – "to be free from assault committed by state officials" – is a liberty interest protected by the Fourteenth Amendment, and applies to superior-subordinate relationships. *See United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) (state judge who sexually assaulted women who served for him); *see also Ingraham v. Wright*, 430 U.S. 651, 673 (1977) ("Among the historic liberties [protected by the due process clause] was a right to be free from and to obtain judicial relief for unjustified intrusions on personal security"). A police officer's infliction of personal injury on a person by the application of undue force deprives that person of a fourteenth amendment "liberty" if the application of force is so egregious that it "shocks the conscience." *Black v. Stephens*, 662 F.2d 181, 188 (3d Cir. 1981); *see also McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1197 (4th Cir. 1996) (unreasonable bodily intrusion, including assault, by coworkers constitutes a substantive due process violation), *overruled on other grounds by, Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

(Cont'd)
argument. Having read the motion, we think that the argument was expressed in a manner sufficient to notify the District Court of the concern and to therefore allow appellate review. *Cf. Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988) ("[a]lthough, as is frequently the case in the heat of a trial, counsel did not explain the evidentiary basis of his argument as thoroughly as might ideally be desired, we are satisfied that he substantially satisfied the requirement of putting the court on notice as to his concern").

Traditional torts based on negligence do not satisfy this standard. "[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *County of Sacramento*, 523 U.S. at 848 (citations omitted). Nevertheless, where an official has an opportunity to deliberate before acting, intent is not necessary, and a substantive due process violation still may exist if the official's actions reached a "level of gross negligence or arbitrariness that indeed 'shocks the conscience.' " *Miller v. City of Phila.*, 174 F.3d 368, 375-76 (3d Cir. 1999).

Viewing the evidence in the light most favorable to Granger, a reasonable jury could have found that Ehlinger, after an opportunity to deliberate, grabbed Granger's throat with an intent to harm or with gross negligence that shocks the conscience, sufficient for a substantive due process violation. The District Court's denial of Ehlinger's Rule 50 motion was proper.

III.

Ehlinger finds fault with the District Court's jury instructions. In evaluating her claims of error, we examine the jury instructions as a whole. *Wheeling v. Kock Gethering Sys. Inc.*, 131 F.3d 898, 903 (10th Cir. 1997). Our review is plenary for misstatements of law, and abuse of discretion otherwise. *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 361 (3d Cir. 1999).

Ehlinger argues that the District Court misstated the law by including, in the instructions, the phrase "substantial

departure from accepted professional judgment." According to Ehlinger, that phrase does not describe behavior that is sufficiently outrageous and egregious as to "shock the conscience." We find no merit in this argument.

The District Court used the phrase at issue only twice. Each time, the Court clearly stated that a substantive due process violation could be found only where a substantial departure from professional judgment actually shocks the conscience. The phrase did not relax the legal standard since the ultimate test was whether the conduct "shocks the conscience." Moreover, the reference to professional judgment was not inappropriate since the inquiry into substantive due process sometimes involves contemporary professional norms. As the Supreme Court has noted, "[the] judgment [as to what shocks the conscience] may be informed by a history of liberty protection, but it necessarily reflects an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them." *County of Sacramento*, 523 U.S. at 847 n.8. We find no error.

Ehlinger also contends that the District Court's use of the phrase "offends the sense of justice" in the jury instructions misstated the legal standard since the phrase set a lower level of conduct upon which to base a substantive due process violation. Our review of this contention is limited to plain error because Ehlinger failed to make a specific objection to the phrase. Reversal for plain error is warranted only when the error "affect[s] substantial rights, and seriously impugns the fairness, integrity or public reputation of the proceedings." *United States v. Gaydos*, 108 F.3d 505, 509 (3d Cir. 1997) (citation omitted).

Having read the jury instructions in their entirety, we think the District Court clearly conveyed to the jury that "shocks the conscience" was the ultimate test. Furthermore, given the indeterminate nature of the substantive due process inquiry, we find little fault in the District Court's reference to justice. Notably, the Supreme Court, in describing the contours of due process, has employed the phrase "shocking the universal sense of justice." *Lewis*, 523 U.S. at 850 (internal quotations and citation omitted). We believe that inclusion of a reference to justice did not constitute plain error.

Finally, Ehlinger argues that, by including an instruction on simple assault, the District Court misled the jury by establishing a lower standard by which to find conscience shocking behavior. We disagree.

The jury instructions clearly stated that a finding of simple assault was not sufficient to find a substantive due process violation. The District Court's instruction that the jury may consider intent in no way lessened the ultimate standard of "shocks the conscience":

> I want to make clear . . . that plaintiff does not establish her claim merely by proving that she was assaulted, or that Miss Ehlinger violated City police rules and regulations. An assault or violation of City police rules and regulations does not necessarily equal a Constitutional violation. Rather, plaintiff must establish from the facts and

circumstances surrounding the incident that Carol Ehlinger's conduct was of such an irrational, arbitrary or unreasonable character as to shock the conscience.

IV.

Ehlinger raises several evidentiary claims of error. Our standard of review for evidentiary decisions is deferential. We generally review only for an abuse of discretion. *Glass v. Phila. Elec. Co.*, 34 F.3d 188, 191 (3d Cir. 1994). Even if an error is found, the error may be harmless if "if it is highly probably that the error did not affect the outcome of the case." *Barker v. Deere and Co.*, 60 F.3d 158, 164 (3d Cir. 1995) (internal quotations and citation omitted). Furthermore, an erroneous decision is not reversible unless it affects a substantial right of the complaining party. *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 752 (3d Cir. 1995).

Ehlinger's first claims centers on a police report written by officer Ellis McCoy. The District Court allowed Granger to testify at trial that she spoke to McCoy about Ehlinger's attack, and that McCoy was "appalled." Subsequently, Ehlinger attempted to read portions of McCoy's police report, arguing that the report would impeach Granger's claims that McCoy was appalled. Ehlinger also argued that the report contained statements by Granger setting forth personal, as opposed to work-related reasons for the attack by Ehlinger. Ehlinger argued that these statements might affect the color of law analysis. The District Court excluded the report on hearsay grounds.

Appendix A

Ehlinger claims that the District Court erred in excluding McCoy's report, arguing (1) that the report was not hearsay since it was not offered for the truth of the matter asserted, Fed. R. Evid. 801(c), and (2) that the report was admissible under Fed. R. Evid. 803(8), which provides an exclusion from the hearsay rule for reports of public agencies setting forth activities of the agency, observations of an official during the course of duty, or factual findings resulting from an investigation. We find these arguments frivolous.

Using the McCoy report to show what Granger said to McCoy raises two discrete hearsay issues. The first concerns the statements Granger made to McCoy, which raise no hearsay problems because they constitute admissions by a party opponent. The second "statement" is the report itself. McCoy did not take the stand and relate what Granger said to him; rather, Ehlinger sought to introduce an out of court statement by McCoy (i.e., the report). That statement was offered to prove the truth of the matter asserted because the report is irrelevant unless it actually captures the substance of the interaction between Granger and McCoy.

Next, the report was not admissible under Fed. R. of Evid. Section 803(8)(A), 803(B), or 803(C). Section 803(A) is inapposite because the report does not set forth the "activities" of the Pittsburgh police department; it simply relays the content of several conversations between two police officers and describes their decision to report an incident to their superior officers. Nor is 803(B) applicable because the report does not describe any "matters observed" by McCoy "pursuant to a duty imposed by law." Finally, the report was not admissible under 803(C) because it sets forth

no "factual findings resulting from an investigation," much less ones supported by any showing of trustworthiness.

Ehlinger's second evidentiary claim involves Granger's testimony about a conversation with a representative of the Fraternal Order of Police ("FOP"), in which a FOP representative allegedly told Granger that if she lied and changed her story about Ehlinger's attack, she would be given a badge and made a detective. Following Granger's testimony, the District Court admonished the jury:

> Ladies and gentlemen, you just heard testimony as to what happened, and testimony about what someone from the FOP told [Granger].
>
> The FOP is not the City of Pittsburgh. . . . Thus, those statements are not chargeable against the City of Pittsburgh as an admission of any wrongdoing. They are a separate entity.
>
> I've introduced this testimony and allowed it to come in for a limited purpose, and that is to explain why Granger did not make a prompt reporting of this incident to her superiors within the police department. . . .
>
> It is simply to explain her conduct, and nothing more. You're to accept it only on that basis.

Ehlinger argues that the District Court erred in allowing Granger's FOP testimony since Granger did not list the

testimony in her pretrial statement, as required by the District Court's local rules. We reject this argument. Local Rule 16.1 E.5 of the United States District Court for the Western District of Pennsylvania states that "[f]ailure to fully disclose in the pretrial narrative statements or the pretrial conference, the substance of the evidence proposed to be offered at trial, will result in the exclusion of that evidence at trial, unless the parties otherwise agree or the court orders otherwise." Since the District Court ordered that the inclusion of the testimony, Local Rule 16.1 E.5 was not violated.

Ehlinger also argues that Granger's FOP testimony linked Ehlinger to an effort to silence Granger, and that the District Court failed to give a cautionary instruction to the jury about linking Ehlinger and the FOP. Thus, Ehlinger argues, the testimony was highly prejudicial and should not have been allowed. This argument is without merit.

Federal Rule of Evidence 403 provides that relevant evidence may be excluded if the danger of prejudice substantially outweighs its probative value. A thorough examination of the transcript shows that Ehlinger was never mentioned in connection with the FOP. Thus, we believe there was little chance that the jury would have impermissibly inferred a connection between Ehlinger and the FOP's actions. In addition, Granger's FOP testimony had probative value in explaining why she did not make a prompt complaint. In these circumstances, the District Court did not abuse its discretion in allowing Granger's FOP testimony.

Ehlinger's third evidentiary claim centers around a hypothetical demonstration of her attack. Within the evidence

presented to the jury, there are seven accounts of the attack, each referring to Ehlinger grabbing Granger by the throat. At trial, Granger's counsel posed a hypothetical question to an expert Witness, John Peters, who was familiar with the attack from reading various depositions and accounts of what happened:

> Granger's Counsel: I'm going to demonstrate for you what I believe to be what occurred, which was that Sergeant Ehlinger placed her hand on Catherine Granger's throat and grabbed her windpipe, and also placed a hand behind her neck and held on to that for some period of time, anywhere from ten seconds to a minute.
>
> [Objection to characterization]
>
> Granger's Counsel: I'm asking [the expert] just to accept these facts as true, Your Honor, for purposes of his further testimony.
>
> The Court: He can do it.
>
> . . . .

Granger's Counsel: What I have just described to you, what is that, if you can tell me, based upon your experience.

Peters concluded that the hypothetical demonstration constituted deadly force.

On cross-examination, the Court clarified the demonstration:

The Court: [Granger's counsel] demonstrated a technique to you here in the courtroom, and based on that demonstration, what you saw, you determined that's deadly force.

Peters: That's correct.

The Court: . . . suppose that's not what happened; suppose the technique that was used was not as demonstrated by [Granger's counsel]. Could you then still give an opinion that it was, deadly force was used?

Peters: Certain elements were there, Your Honor, yes. If it was something totally different, then I would have to know what that is, and that would change the opinion.

Appendix A

Ehlinger argues that the demonstration lacked a proper factual basis. We disagree. Expert witnesses are permitted to offer opinions from what is made known to them at trial, including a hypothetical demonstration, so long as the demonstration is based in facts reasonably relied upon by experts in the particular field. *See* Fed. R. Evid. 703 (Bases of Opinion Testimony by Experts). Peters testified that he had reviewed all the evidence in the record, including the numerous accounts of Ehlinger's attack. The jury was aware of these accounts. Granger's counsel presented a hypothetical demonstration based in fact – specifically, all the accounts mention throat grabbing. The District Court did not abuse its discretion in allowing the demonstration.

Peters testified that a hypothetical demonstration by Granger's counsel constituted "deadly force." Ehlinger argues that whether the force was "deadly" was irrelevant to whether Ehlinger's acts constituted conscience-shocking behavior in violation of 14th Amendment substantive due process. Thus, Ehlinger argues, the District Court abused its discretion in allowing the testimony. We disagree.

Rule 702 allows expert testimony if the testimony will assist the finder of fact in understanding the evidence or reaching a conclusion. Peters was an expert in police tactics, use of force, and police administration. The standard for substantive due process lacks precision. Numerous factors, including whether applied force is deadly, are surely relevant to determine whether force "shocks the conscience." Additionally, the jury might not have been aware that the grabbing of the throat constitutes deadly force – Peter's testimony helped them understand the nature of Ehlinger's assault. The District Court did not abuse its discretion in allowing the testimony.

Appendix A

V.

Having carefully reviewed each of Ehlinger's claims of error, we find them without merit, and will affirm the judgment of the District Court.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion

Julio M. Fuentes
Circuit Judge

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED DECEMBER 23, 1999

UNITED STATES DISTRICT COURT
Western District of Pennsylvania

CASE NUMBER: C.A. 96-240

CATHERINE A. GRANGER

V.

CITY OF PITTSBURGH and CAROL EHLINGER, individually and as a Police Officer for the City of Pittsburgh

JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment be and hereby is entered in favor of defendant, City of Pittsburgh, and against plaintiff, Catherine A. Granger.

Appendix B

IT IS FURTHER ORDERED AND ADJUDGED that judgment be and hereby is entered in favor of plaintiff, Catherine A. Granger, and against defendant, Carol Ehlinger, individually and as a Police Officer for the City of Pittsburgh, in the amount of $115,000.00.

JUDGMENT SO ORDERED AND TO BE ENTERED IN ACCORDANCE TO THE VERDICT RENDERED BY THE JURY.

s/ Gary L. Lancaster
GARY L. LANCASTER, U.S. DISTRICT JUDGE

12/23/99
Date

JAMES A. DRACH, CLERK OF COURT
Clerk
s/ Michael Palus
(By) *Deputy Clerk*

APPENDIX C — VERDICT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 96-240

CATHERINE A. GRANGER,

Plaintiff,

v.

CITY OF PITTSBURGH, and Carol Ehlinger, individually and as a Police Officer for the City of Pittsburgh,

Defendants.

VERDICT

Catherine A. Granger v. Carol Ehlinger

(Fourteenth Amendment Due Process of Law)

Do you find for:

Catherine A. Granger ✓

or

Carol Ehlinger ____

Appendix C

If you find for Catherine A. Granger, what amount of compensatory damages do you award?

$40,000.00

Do you award punitive damages?

Yes ✓ No _____

If Yes, how much?

$75,000.00

Dated: 12/23/99

s/ [illegible]
Foreperson
s/ Carolyn E. Kelley
s/ Shmela K. Smith
s/ Pamela J. Daley
s/ Jeanne M. Katona
s/ Debra Cooney
s/ Ronald Valentino

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED NOVEMBER 7, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-3169

CATHERINE A. GRANGER

v.

CITY OF PITTSBURGH; CAROL EHLINGER,
individually and as a Police Officer for the
City of Pittsburgh

Carol Ehlinger, individually and as a Police
Officer for the City of Pittsburgh,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

(D.C. Civ. No: 96-cv-00240
District Court Judge: The Honorable Gary L. Lancaster

SUR PETITION FOR REHEARING

Appendix D

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO and FUENTES, *Circuit Judges*

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT

s/ Julio M. Fuentes
United States Circuit Judge

DATED: Nov 7 – 2001

ch/cc: SHB
SEM
JWC
TP.O.